Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

JAMES J. CONDIT, JR., et al.,

Petitioners,

v.

HAMILTON COUNTY, OHIO, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE HAMILTON COUNTY COURT OF APPEALS FIRST APPELLATE DISTRICT OF OHIO

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46 pp.

QUESTIONS PRESENTED

I. ARE COUNTIES AND CITIES WHOSE POLICY MAKERS ENFORCE A COURT ORDER IN A MANNER WHICH VIOLATES CONSTITUTIONAL RIGHTS ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY FROM CLAIMS BROUGHT UNDER 42 U.S.C. §1983?

II. ARE LAW ENFORCEMENT OFFICIALS ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY FROM CLAIMS BROUGHT UNDER 42 U.S.C. §1983 WHEN THEIR MANNER OF ENFORCING A COURT ORDER VIOLATED THE ORDER ITSELF AND RESULTED IN CONSTITUTIONAL VIOLATIONS?

PARTIES TO THE PROCEEDING BELOW

Plaintiffs-Appellants: JAMES J. CONDIT, JR., KATHY CONDIT, ROSEMARY CALLAHAN, DAVID CALLAHAN, MICHAEL O'BRIEN, NANCY O'BRIEN, WARREN SMITH, PAMELA SMITH, ANTHONY TIDWELL, SHEILA TIDWELL, MICHAEL MEYER, SARA MEYER, THOMAS SINGLETON, JASON MILLER, CYNTHIA CONKLIN, DAVID CONKLIN, TERRI CONKLIN, ROGER SPRY, DON JOHNSON, JOSEPH EDWARD MARTIN, JOHN PARKER, TERRY PARKER, JOANNE ENGEL, DANIEL ENGEL, and KATHLEEN ENGEL, a minor by Joanne Engel.

Defendants-Appellees: HAMILTON COUNTY, OHIO, HAMILTON COUNTY BOARD OF COUNTY COMMISSIONERS, SIMON L. LEIS, LINCOLN STOKES, DANIEL WOLFANGEL, DANIEL LOSITO, CITY OF CINCINNATI, LAWRENCE E. WHALEN, DONALD HUDSON, and DANIEL CAIN

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No.

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JAMES J. CONDIT, JR., et al.,

Petitioners,

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HAMILTON COUNTY, OHIO, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE HAMILTON COUNTY COURT OF APPEALS FIRST APPELLATE DISTRICT OF OHIO

James J. Condit, Jr., Anthony Tidwell, Thomas Singleton, Jason Miller, Roger Spry, Cynthia Conklin, David Conklin, Donald Johnson, Thomas Davis, Gerald Taylor, Joseph Edward Martin and Kathleen Engel (a minor, by Joanne Engel) respectfully petition for a writ of certiorari to review the judgment of the Hamilton County Court of Appeals, First

Appellate District of Ohio, which affirmed the Final Judgment of the Hamilton County Court of Common Pleas granting Summary Judgment to Respondents and denying partial Summary Judgment to Petitioners.

OPINIONS BELOW

The Opinion of the Hamilton County Court of Appeals, First Appellate District of Ohio, is unpublished. The electronic citation is *Condit v. Planned Parenthood* (Feb. 26, 1997), 1997 WL 78589, Hamilton App. No. C960126. The opinion is reprinted in Appendix D.

The Decision of the Hamilton County Court of Common Pleas granting summary judgment to the Respondents and dismissing Petitioners' claims is also unpublished. It is reprinted in Appendix E.

JURISDICTION

Jurisdiction is conferred in this case pursuant to 28 U.S.C. § 1257(a). The Hamilton County Court of Common Pleas entered Final Judgment on January 25, 1996. The Hamilton County Court of Appeals, First Appellate District of Ohio, affirmed the judgment on February 26, 1997.

The Supreme Court of Ohio declined to exercise jurisdiction of Petitioners' appeal and denied review of the Judgment of the First Appellate District of Ohio on June 18, 1997. See Appendix C.

The Supreme Court of Ohio denied Petitioners' Motion For Reconsideration on September 3, 1997. See Appendix B

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

Set forth in Appendix A are U.S. Const. Amendment I, U.S. Const. Amendment IV, U.S. Const. Amendment XIV, Section I, and 42 U.S.C. §1983.

STATEMENT OF THE CASE

1. The State Court Injunction Action.

On March 26, 1986, Planned Parenthood Association of Cincinnati, Inc. ("Planned Parenthood") filed a Complaint in the Hamilton County (Ohio) Court of Common Pleas seeking injunctive relief against various groups and individuals, whom Planned Parenthood alleged had committed a variety of tortious acts in the vicinity of its abortion clinic located on Vine Street in Cincinnati, Ohio. The name of the case was *Planned Parenthood v. Project Jericho*.

Planned Parenthood originally sued only a small number of groups and individuals, but soon became more ambitious. Rather than seeking to enjoin and punish actual wrongdoers, Planned Parenthood moved for certification of a defendant class so that everyone served with a copy of the injunction would be bound by it. In spite of the over-

whelming due process problem posed by such a blanket injunction, Hamilton County Common Pleas Judge Thomas Crush ("Judge Crush") accommodated Planned Parenthood's desires on June 20, 1986 with the Preliminary Injunction described below.

Petitioner Condit was one of the individual defendants originally sued by Planned Parenthood. Unlike the other Petitioners, therefore, Condit at least had notice of the litigation and an opportunity to defend himself. However, Planned Parenthood offered no evidence of wrongdoing by Condit and Judge Crush made no such finding. Still, Judge Crush designated Condit as a representative of the defendant class which he later certified and enjoined.

None of the other Petitioners herein were ever named as parties, given notice of the class certification hearing, or otherwise permitted to assert individual defenses (i.e., innocence of any wrongdoing) prior to the issuance of the injunction described below. Indeed, many of these Petitioners did not live in Cincinnati and had never even been present at the clinic until June 28, 1986, eight days after the Injunction was issued.

2. The Court Orders.

Judge Crush issued two orders relevant to the arrests in this case. On June 20, 1986, he certified a defendant class and issued a preliminary injunction ("Injunction") against it. *See Appendix F.* The Injunction defined the defendant class as follows:

> Persons picketing between the South curb of Louis Ave and the North curb of Shields Avenue and on both sides of Vine Street from Louis Ave to Shields Ave who have been personally served with this order as well as their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who received personal service of the order.

The Injunction imposed a limit of five pickets on the east side of Vine Street, as well as other restrictions. Receiving personal service of the Injunction was a prerequisite of class membership, so that no one was bound by the Injunction unless first served with a copy of it. (This is a crucial fact for deciding the immunity issue.)

On June 27, 1986, Judge Crush issued a second order titled "Order to the Sheriff", which required the Hamilton County Sheriff to be present at the clinic on Saturdays, to serve individuals with the Injunction, and to arrest violators. *See Appendix G.* Judge Crush also made the following remarks in open court on June 27, 1986 consistent with his Order To The Sheriff:

> I am now signing an order that henceforth the Sheriff shall arrest on the spot anyone violating my order. See that that's filed, copy given to the Sheriff. I do request orally that no arrests be made unless the service has been photographed, the violation has been photographed and an affidavit signed on the spot by someone who knows the facts.

3. The Conspiracy.

Petitioners were arrested as a direct result of a civil conspiracy which took place later that day between Planned Parenthood's attorneys and members of the Hamilton County Sheriff's Office (collectively "Sheriff"), who agreed upon a scheme for enforcing the injunction. The scheme permitted Planned Parenthood to interpret the injunction, determine who was violating it, and provide affidavits to the Sheriff, who would then execute the arrests.

4. The Arrests and Constitutional Violations.

On June 28, 1986, a hundred or more people showed up to protest at the clinic. By morning's end, Petitioners were arrested by Respondents for doing little more than walking, standing, or kneeling in prayer on the public streets and sidewalks. Moreover, people affiliated with Planned Parenthood, members of the media, and other unidentified members of the general public were permitted to freely walk, stand, or kneel in the same areas and in the same manner as the Petitioners were, with no threat of arrest. However, only those persons exhibiting pro-life views or identifiable as pro-life protestors were arrested.[1]

In direct violation of the Order To The Sheriff, seven of the Petitioners (Tidwell, Miller, Taylor, Spry, C. Conklin, D. Conklin and Engel) were arrested without being served with a copy of the Injunction. In other words, they

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[1] These facts go to the core of Petitioners' substantive constitutional claims, which were not addressed on the merits by any of the lower courts and therefore will not be addressed in this Petition.

were arrested for violating an injunction which they had no legal duty to obey. Two others (Davis and Johnson) were arrested by the Sheriff based upon boilerplate affidavits which were prepared by Planned Parenthood but which were never completed and charged them with no offense. Condit, Singleton and Martin, were arrested while clearly complying with the Injunction. The Sheriff made the arrests without using any independent discretion, without judicial review and in the absence of any criminal activity. Except for Kathleen Engel (a juvenile who was held for only about one hour), all of the Petitioners were incarcerated for 13 hours even though they were innocent.

Charges against all of the Petitioners were later dismissed without trial, and the Injunction was later dissolved without ever being made a final appealable order. Therefore, this §1983 damage action is the only vehicle available to Petitioners for vindicating their constitutional rights.

5. Facts Supporting County and City Liability Under §1983.

Respondent Lincoln Stokes was the Hamilton County Sheriff at the time and personally participated in the arrests. He was the top policy-making official in Hamilton County for law enforcement procedures and enforcement of court orders.

Moreover, the City of Cincinnati has stipulated that Respondents Hudson and Cain acted pursuant to the policies, customs, training and instruction of the City of

Cincinnati and its Police Division when they aided the Sheriff in making the arrest of Respondent Joseph Martin.

6. Facts Supporting Individual Liability Under §1983.

It is undisputed that Respondents Stokes, Wolfangle, Losito, Hudson and Cain were all present and personally participated in the arrests.

7. Proceedings Below and Decisions of the Lower Courts.

On June 26, 1987, Petitioners (and several others who are no longer parties to this appeal) filed a Complaint in the Hamilton County (Ohio) Court of Common Pleas seeking monetary damages pursuant to 42 U.S.C. §1983. Petitioners alleged wrongful arrests and the violation of their rights under the First, Fourth and Fourteenth Amendments to the U.S. Constitution. Named as defendants were various individuals affiliated with Planned Parenthood (all of whom were dismissed as parties pursuant to a settlement in 1990) and the following (governmental Respondents:

a) Hamilton County, Ohio, Board of County Commissioners of Hamilton County, Ohio, Lincoln Stokes, Daniel Wolfangel and Daniel Losito; and

b) City of Cincinnati, Lawrence E. Whalen, Donald Hudson and Daniel Cain.

After discovery, two amendments of the Complaint and the disposition of numerous pretrial motions (some of which disposed of other claims and parties), the remaining parties filed cross motions for summary judgment on September 13 & 14, 1995. On January 16, 1996, the Trial Court issued a Decision[2] denying Petitioners' motion for partial summary judgment and granting summary judgment in favor of Respondents. On January 25, 1996, Final Judgment was entered accordingly.

On February 23, 1996, Plaintiffs appealed to the Hamilton County Court of Appeals, First Appellate District of Ohio, which affirmed the judgment of the Trial Court on February 26, 1997. On April 14, 1997, Petitioners appealed to the Supreme Court of Ohio, which declined jurisdiction on June 18, 1997. On June 28, 1997, Petitioners filed a Request For Reconsideration, which the Supreme Court of Ohio denied on September 3, 1997.

8. Stage of Proceedings Where Federal Questions Were Raised.

Petitioners asserted all of their federal constitutional claims in their Complaint(s) and also in their Motion for Partial Summary Judgment filed on September 14, 1995. The Respondents asserted the defense of absolute quasi-judicial immunity in their respective Answers and in their Motions for Summary Judgment filed on September 13, 1995.

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[2] The Trial Court's decision [Appendix E] makes reference to opinions written earlier in the case, but none of them disposed of the claims and issues raised in this Petition.

Petitioners asserted error in the Hamilton County Court of Appeals as follows:

ISSUE #1 PRESENTED FOR REVIEW

Defendants Hamilton County, Ohio and the City of Cincinnati, as governmental entities, are not entitled to absolute quasi-judicial immunity.

ISSUE #2 PRESENTED FOR REVIEW

Individual Sheriff deputies and police officers are not entitled to absolute quasi-judicial immunity when they violate the very orders they are charged with enforcing.

Petitioners asserted those same errors to the Supreme Court of Ohio in their Memorandum In Support of Jurisdiction filed on April 14, 1997;

PROPOSITION OF LAW #1

Counties and cities, as governmental entities are not entitled to absolute quasi- judicial immunity in claims under 42 U.S.C. Section 1983.

PROPOSITION OF LAW #2

Police Officers are not entitled to absolute quasi-judicial immunity when they violate the judicial order they are enforcing.

REASONS FOR GRANTING THE WRIT

In *Planned Parenthood v. Project Jericho* (1990), 52 Ohio St.3d 56, 556 N.E.2d 157, the Supreme Court of Ohio reviewed and upheld the contempt convictions of several other protestors who were convicted for violating the same injunction under which Petitioners were arrested in this case. In doing so, the Supreme Court of Ohio upheld the validity of an extremely dubious injunction and class certification. Although Petitioners will always believe that *Planned Parenthood* was wrongly decided[3], it is not dispositive of the issues raised in this Petition, which focuses on independent law enforcement decisions (by, or in accord with, County and City policy making officials) which led to the wrongful and discriminatory arrests of innocent people based exclusively on political affiliation and viewpoint.

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[3] All of the facts and all of the binding precedent which required the opposite result were omitted from this Court's published opinion.

ISSUE #1
COUNTIES AND CITIES WHOSE POLICY MAKERS ENFORCE A COURT ORDER IN A MANNER WHICH VIOLATES CONSTITUTIONAL RIGHTS ARE NOT ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY FROM CLAIMS BROUGHT UNDER 42 U.S.C. §1983.

The Court of Appeals held that Respondents Hamilton County and City of Cincinnati enjoy absolute quasi-judicial immunity for their role in enforcing the Injunction. Although this Court has never addressed (as an actual holding of a case) the availability of absolute quasi-judicial immunity to cities and counties whose agents enforce a court order, it has done the next best thing in other cases with clear discussions of the immunities available to individuals and governmental entities sued under 42 U.S.C. §1983.

This analysis begins with *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), wherein this Court set forth the principles for establishing municipal liability under §1983. Under *Monell*, the conventional tort principle of respondent superior was rejected. *Id.* at 691. However, this Court went on to hold that municipalities can be held liable for constitutional violations under §1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury...." *Id.* at 694.

If *Monell* left other immunity questions unanswered, they began to be answered shortly thereafter. In *Owen v. City of Independence*, 445 U.S. 622 (1980), this Court held that local governments are ***not*** entitled to qualified immunity.

Further clarification on the question of municipal immunities was later provided in *Kentucky v. Graham*, 473 U.S. 159 (1985), when this Court explained the difference between official capacity actions and individual capacity actions and stated:

> When it comes to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such as objectively reasonable reliance on existing law. In an official capacity action, these defenses are unavailable. The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, qua entity, may possess, such as the Eleventh Amendment.

473 U.S. at 166-67. Because official capacity actions are the equivalent of suing the government itself, it necessarily follows that those same personal immunity defenses are not available to governments.

Most recently, in *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163 (1993), Chief Justice Rehnquist discussed similar municipal liability and immunity issues while rejecting a heightened pleading standard for §1983 claims against municipalities. Writing for a unanimous Court and reaffirming the *Monell* principle, he stated:

> These decisions make it quite clear that, unlike various government officials, municipalities do not enjoy immunity from suit - either absolute

> or qualified - under §1983. In short, a municipality can be sued under §1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury.

507 U.S. at 166.

It could not be more clear. Only someone deliberately misreading this Court's explicit statements could now conclude that cities and counties are entitled to the absolute immunities available to government officials.

The decision of the Court of Appeals in this case is also contrary to the case law developing in the federal circuits. See *Russo v. City of Cincinnati*, 953 F.2d 1036, 1046 (6th Cir. 1992) ("the City, unlike the individual officers in this case, is not entitled to any level of immunity...."); *Goldberg v. Town of Rocky Hill*, 973 F.2d 70 (2nd Cir. 1992) (rejecting absolute legislative immunity for a municipal corporation and citing extensively from *Graham* and *Owen*); *Brummett v. Camble*, 946 F.2d 1178 (5th Cir. 1991) (rejecting absolute prosecutorial immunity for county).

The Court of Appeals in this case disregarded all such authority and relied instead on *Doe v. McFaul*, 599 F.Supp. 1421 (N.D.OH 1984), a district court case which predated all of it. Indeed, *McFaul* discussed some principles of judicial immunity without giving any justification for including a county government within its scope. It is hard to tolerate such a result, and it is incumbent on this Court to prevent the proliferation of such erroneous case law, especially when it collides with the principles clearly enunciated by this Court and by several of the federal circuits.

It took this Court only two years after *Monell* to establish that the qualified immunity defense is not available to municipalities. Surely this Court will eventually decide the same issue with respect to the other "personal" immunities, including absolute quasi-judicial immunity. In the interests of law and justice, Petitioners implore the justices of this Court to do it now.

ISSUE #2
LAW ENFORCEMENT OFFICIALS ARE NOT ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY FROM CLAIMS BROUGHT UNDER 42 U.S.C. §1983 WHEN THEIR MANNER OF ENFORCING A COURT ORDER VIOLATES CONSTITUTIONAL RIGHTS.

The individual defendants in this case were likewise granted the protection of quasi-judicial immunity for their participation in the arrests of Plaintiffs on June 28, 1986. This is also wrong, but for different reasons.

The jurisprudence of this Court over the past twenty years makes an unbelievably sweeping blanket of immunity available to judges (and judicial officers) from §1983 liability. *Stump v. Sparkman*, 435 U.S. 349 (1978); *Mireless v. Waco*, 502 U.S. 9 (1991). Still, judicial immunity has some limits, and state officials bear the burden of showing in a particular case that public policy requires an exemption as broad as absolute immunity. *Butz v. Economou*, 438 U.S. 478 (1978). "Absolute immunity is 'strong medicine, justified only when the danger of [officials being] deflect[ed] from the effective performance of their duties] is very great'". *Forrester v. White*, 484 U.S. 219, 230 (1988).

The unconscionable conduct of the Respondents in this case does not merit such protection, for a number of reasons. First and foremost, they violated the very Order under which they were awarded protection.[4] The Sheriff was ordered to serve the Injunction on picketers and then to arrest violators. Neither the Injunction nor the Order to the Sheriff made exceptions for enforcing the Injunction or limited its scope to pro-life protestors. Instead of enforcing the Injunction objectively, the Sheriff delegated his duty for enforcing the injunction to Planned Parenthood, a private party to a hotly contested and ideologically-driven civil lawsuit. The Sheriff then proceeded to completely subjugate himself and his deputies to the discretion of Planned Parenthood, using no independent judgment. The result was the arrests of seven individuals who had never been served with the Injunction, two individuals who were charged with no violations of the Injunction, and three others who, in fact, were not violating the Injunction. The arrests also constituted a selective prosecution which makes the blood boil (unless you work for Planned Parenthood). All such arrests were in direct violation of Judge Crush's Order to the Sheriff, and did not constitute "good faith efforts to faithfully carry out their duties" or other such verbiage as the Respondents argued below and will most certainly argue to this Court.

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[4] The Court of Appeals literally ignored the *stipulated* facts of this case when it stated that the Petitioners "have not presented sufficient evidence that the [Respondents] acted beyond the Judge's order. [Appendix at pp. 10a] In the context of a summary judgment decision where all facts were supposedly construed most favorably to the Petitioners, it is impossible to conclude that the Respondents complied with the Trial Judge's order, especially when they arrested seven people who were never served with the Injunction. Yet, both of the lower courts reached this same conclusion. Such a conclusion gives new meaning to the phrase "blind justice".

Although Court personnel and law enforcement officials executing court orders are generally entitled to absolute immunity for such "quasi-judicial" conduct, *Johnson v. Granholm*, 662 F.2d 449, 450 (6th Cir. 1981), law enforcement officials are not entitled to absolute immunity for actions not directed by court order. *Torres Ramirez v. Bermudez Garcia*, 898 F.2d 224 (1st Cir. 1990). Nor are such officials necessarily entitled to absolute immunity for the *manner* in which they carry out a judicial order:

> [A] judicial warrant contains an implicit directive that the arrest and subsequent detention be carried out in a lawful manner. Insofar as defendants exceeded legal bounds in executing the warrant for arrest, defendants have a fortiori violated the very judicial order under which they seek the shelter of absolute immunity.

Martin v. Board of County Commissioners of Pueblo County, 909 F.2d 402, 405 (10th Cir. 1990). Acting *pursuant to* a Court Order is one thing; recklessly abandoning and violating the Court's directive, and devising one's own methods to accommodate one party to a civil dispute, to the detriment of innocent victims, is quite another.

This case is a civil rights outrage of the highest order. What happened in Cincinnati, Ohio on June 28, 1986 was pure tyranny, and the Ohio courts have done everything since then to insure that these Petitioners, as members of that "currently disfavored class of antiabortion protestors", *Lawson v. Murray*, ___ U.S.___, 115 S.Ct. 2264, 132 L.Ed.2d 269, 273 (1995) (Scalia, J., concurring), would never see victory or

redress. If the contours of judicial immunity can really be stretched so far as to protect the conduct of the Respondents in this case, then it is a doctrine which has spiraled out of control, based upon "public policy" considerations with which no member of the general public agrees.

IV. CONCLUSION

For the reasons set forth above, Petitioners pray that their Petition For A Writ Of Certiorari be granted.

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Counsel For Petitioners

APPENDIX A

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

U. S. Const. Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Const. Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U. S. Const. Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983

Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. §1979; Dec. 29, 1979, P.L. 96-170, §1, 93 Stat. 1284)

OHIO RULES OF CIVIL PROCEDURE

RULE 56. Summary Judgment

(C) Motion and proceedings thereon. The motion shall be served at least 14 days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is

entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. A summary judgment, interlocutory in character, may be issued on the issue of liability alone although there is a genuine issue as to the amount of damages.

APPENDIX B

[Filed September 3, 1997]

THE SUPREME COURT OF OHIO

1997 TERM

Case No. 97-727

James J. Condit, Jr., et al.,

Appellants,

v.

Planned Parenthood Assn. of Cincinnati,

Appellee.

RECONSIDERATION ENTRY

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Court of Appeals No. C960126)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX C

[Filed June 18, 1997]

THE SUPREME COURT OF OHIO

1997 TERM

Case No. 97-727

James J. Condit, Jr., et al.,

Appellants,

v.

Planned Parenthood Assn. of Cincinnati,

Appellee.

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Thomas W. Condit, Esq.

(Hamilton County Court of Appeals; No. C960126)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX D

[Filed February 26, 1997]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

Appeal No. C-96-126
Trial No. A-8704811

JAMES J. CONDIT, JR., KATHY CONDIT, ROSEMARY CALLAHAN, DAVID CALLAHAN, MICHAEL O'BRIEN, NANCY O'BRIEN, WARREN SMITH, PAMELA SMITH, ANTHONY TIDWELL, SHEILA TIDWELL, MICHAEL MEYER, SARA MEYER, THOMAS SINGLETON, JASON MILLER, CYNTHIA CONKLIN, DAVID CONKLIN, TERRI CONKLIN, ROGER SPRY, DON JOHNSON, JOSEPH EDWARD MARTIN, JOHN PARKER, TERRY PARKER, JOANNE ENGEL, DANIEL ENGEL, and KATHLEEN ENGEL, a minor by Joanne Engel,

Plaintiff-Appellants,

vs.

PLANNED PARENTHOOD ASSN. OF CINCINNATI,

Defendant,

and

HAMILTON COUNTY, OHIO, HAMILTON COUNTY BOARD OF COUNTY COMMISSIONERS, SIMON L.

LEIS, LINCOLN STOKES, DANIEL WOLFANGEL, DANIEL LOSITO, CITY OF CINCINNATI, LAWRENCE E. WHALEN, DONALD HUDSON, and DANIEL CAIN,
Defendants-Appellees.

DECISION

Civil Appeal From: Hamilton County Court of Common Pleas
Judgment Appealed From is: Affirmed
Date of Judgment Entry on Appeal: February 26, 1997

Thomas W. Condit, Esq., No. 0041299, Kenwood Professional Building, 9403 Kenwood Road, C-208, Cincinnati, Ohio 45242, for Plaintiffs-Appellants,

Joseph T. Deters, Prosecuting Attorney, No. 0012084, and Philip L. Zorn, Jr., Esq., No. 0018601, 125 East Court Street, Suite 300, Cincinnati, Ohio 45202, for Defendants-Appellees Hamilton County, Board of County Commissioners of Hamilton County, Simon L. Leis, Lincoln Stokes, Daniel Wolfangel, and Daniel Losito,.

Fay D. Dupuis, City Solicitor, No. 0020782, and Julie F. Bissinger, Esq., No. 0012055, Room 214, City Hall, 801 Plum Street, Cincinnati, Ohio 45202, for Defendants-Appellees City of Cincinnati, Lawrence E. Whalen, Donald Hudson, and Daniel Cain.

PER CURIAM.

Appellants appeal the trial court's judgment granting appellees' motions for summary judgment and motions to dismiss. Because we conclude that none of appellants' assignments of error is well taken, we affirm the judgment of the trial court.

In January 1986, after Planned Parenthood Association ("Planned Parenthood") moved a clinic where abortions and other services are provided, protests at that location picked up. On March 28, 1986, Planned Parenthood filed a complaint seeking injunctive relief against various protesters. On June 20, 1986, the trial court granted a preliminary injunction which defined the class and prohibited activities. On June 27, 1986, the trial court issued an order to the sheriff concerning the enforcement of the injunction on June 28, 1986. The trial court also requested that no arrests be made unless the alleged violation was photographed and an affidavit was signed. Later on that same day, Colonel Daniel Wolfangel of the Hamilton County Sheriff's department met with attorneys representing Planned Parenthood. Wolfangel and the attorneys decided on guidelines to comply with the trial court's order on June 28. Sheriff's deputies would attempt to serve individuals with the injunction as they arrived at the site. Planned Parenthood staff members would videotape any violations and sign affidavits. On June 28, 1986, appellants were arrested for contempt of the trial court's order.

On June 26, 1987, appellants filed a complaint against appellees, Planned Parenthood, and various Planned Parenthood staff members[1], alleging violations of Section 1983, Title 42, U.S.Code. On November 25, 1987, appellants filed a motion for the recusal of Judge Thomas Crush. The motion was denied. Upon motion of the appellees, claims of ten of the appellants were dismissed.[2] Cross-motions for summary judgment were filed by the remaining parties, and the trial court granted the appellees motions for summary judgment.

In their first assignment of error, appellants state that the trial court erred in granting the appellees' motions for summary judgment. Appellants contend that neither the governmental appellees nor the individual appellees are entitled to immunity from the claims. We disagree.

It is a well-settled principle that judges are extended immunity for acting in their official capacity. This immunity is forfeited only where a judge acts in the "clear absence of all jurisdiction." *Stump v. Sparkman* (1978), 435 U.S. 349, 356-357, citing *Bradley v. Fisher* (1871), 80 U.S. 335, 20 L.Ed. 646. In this case, Judge Crush did not act beyond his jurisdiction. This immunity extends to public officials who perform "quasi-judicial" functions. *Johnson v. Granholm* (C.A.6, 1981), 662 F.2d 449. In *Doe v. McFaul* (1984), 599

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[1]Appellants' claims against the Planned Parenthood defendants were dismissed as part of a settlement of all litigation pending between appellants and Planned Parenthood.

[2]The motions to dismiss were granted as to the claims of Rosemary Callahan, David Callahan, Michael O'Brien, Nancy O'Brien, Michael Meyer, Sara Meyer, Joanne Engel, Daniel Engel, John Parker, and Terry Parker.

F.Supp. 1421, the United States District Court for the Northern District of Ohio, Eastern Division, recognized that the same rationale for judicial immunity applied to individuals "acting under the command of a court decree or explicit instructions from a judge." Id. at 1431, citing *Henriksen v. Bentley* (C.A.10, 1981), 644 F.2d 852, 855. In this case, the propriety of extending immunity is enhanced by the fact that the order at issue has been held to be valid. We also note that appellants have not presented sufficient evidence that the appellees acted beyond the judge's order.

Appellants point to dicta in *Leatherman v. Tarrant County Narcotics Unit* (1993), 507 U.S. 163, 113 S.Ct. 1160, for the proposition that absolute or qualified immunity does not extend to the governmental entities. However, that case dealt with an action instituted against a municipality for alleged Fourth Amendment violations by police officers. The court did not address the issue of immunity which attaches to individuals and entities carrying out judicial orders.

Accordingly, we conclude that based on the reasoning of *McFaul* the appellees are immune from Section 1983 liability as an extension of the judge's immunity.

We will consider appellants' next two assignments of error together. In their second assignment of error, the appellants assert that the trial court erred in not granting their motion for partial summary judgment. The third assignment of error[3] is that the trial court erred in granting appellees' motion to dismiss the claims of various appellants. Because we have

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[3]We note that in appellants' brief, their last two assignments of error are misnumbered as the fourth and fifth and assignments of error.

concluded that the trial court properly granted appellees' motions for summary judgment based on appellees' immunity from Section 1983 liability, these assignments of error are moot.

Appellants' fourth assignment of error is that the trial court erred by denying appellants' motion for recusal. Because we have concluded that the trial court properly granted the motions for summary judgment, we are unable to conclude that any of the trial court's decisions were biased. Therefore, we conclude that the trial court did not err in denying the motion for recusal. The fourth assignment of error is not well taken.

We have determined that the first and fourth assignments of error are without merit. Further, the second and third assignments of error are moot. Accordingly, the judgment of the trial court is affirmed.

HILDEBRANDT, P.J., GORMAN and SHANNON, JJ.

Judge Raymond E. Shannon, Retired from the Court of Appeals, First Appellate District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX E

[Filed January 16, 1996]

COURT OF COMMON PLEAS
HAMILTON COUNTY OHIO

Case Nos. A8704811
A8801299
A8602417

(Judge Crush)

JAMES CONDIT, JR., ET AL.

Plaintiffs

v

PLANNED PARENTHOOD OF CINCINNATI, ET. AL.

Defendants

DECISION RE: MOTION
FOR SUMMARY JUDGMENT

This matter is before the Court upon motion for summary judgment filed on behalf of defendants City of Cincinnati, Lawrence E. Whalen, Donald Hudson and Daniel Cain and upon motion for partial summary judgment filed on behalf of plaintiffs.

Counsel for both sides have admirably briefed applicable law. The Court does not wish to review these thorough briefs in detail here, partly because the Court has, in a series of lengthy oral and written opinions of record in these cases, aleady discussed most of the pertinent issues. Certain matters will be briefly addressed, however.

First and foremost, each of the arrests in question were carried out, by each of the arresting persons, according to the orders of this Court; and, therefore, the arresting persons benefit from the immunity of this Court.

Plaintiffs allege that the arrest procedure, as actually carried out, did not comport with the orders of this Court; and that, therefore, the arresting persons lost any immunity that might have been derived from this Court. This argument is based upon the erroneous concept that probable cause for an arrest can arise only from the personal observation of the arresting officer. This Court has pointed out in an earlier opinion (attached to defendants' motion for summary judgment) that this concept is not correct. The affidavits in this case gave the officers probable cause to make the arrests.

The real complaint, if any, that plaintiffs have is that the persons who signed the affidavits, which provided probable cause for the arrests, signed them erroneously or falsely. Whether this is true or not will never be litigated since plaintiffs have settled with these persons and dismissed them from these actions. Plaintiffs, having voluntarily removed from litigation the only persons who may have wronged them, cannot now be permitted to proceed against

persons who acted under the orders of the Court, in the manner established by the Court, and upon probable cause.

Defendants motion for summary judgment is granted; plaintiffs' motion for partial summary judgment is denied.

No attorney fees are awarded.

Counsel shall present an entry or entries, properly endorsed, granting and denying summary judgment as aforesaid on or before January 26, 1995, 9:00 A.M.

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APPENDIX F

[Filed June 20, 1986]

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A8602417
(Judge Crush)

PLANNED PARENTHOOD ASSOCIATION
OF CINCINNATI, INC., et al.

Plaintiff

vs.

PROJECT JERICHO, et al.

Defendants.

PRELIMINARY INJUNCTION

Plaintiff runs a medical clinic at 3332 Vine Street, Cincinnati, OH, where a variety of services including abortions are performed. Plaintiff claims that its staff and patients have suffered injury by virtue of defendants' acts of harassment and interference which constitute a nuisance. Plaintiff seeks an order certifying a defendant class and restraining these acts of harassment. Plaintiff-intervenors are all of the tenants in the apartment building next door to the

medical clinic at one Louis Street on the Southeast corner of Louis and Vine Street.

This matter came on for hearing under Rule 65 and Rule 23 of the Ohio Rules of Civil Procedure on motions to amend an earlier preliminary injunction in this case and a motion to certif y a defendant class. Evidence and argument was heard on April 9 and June 13, 16, 17, 18, and 19, 1986.

This Court has made specific findings of fact and conclusions of law, to wit, that the picketers at and near 3332 Vine Street have blocked the sidewalk and drive of the plaintiff, created loud and disturbing noise, and created hazards with their signs on a regular basis. Such conduct has been found to constitute a nuisance and it has been determined that the conduct must be enjoined. A preliminary injunction was issued on April 4, 1986. This Court does hereby grant a modification of the injunction for the reason that plaintiff and plaintiff intervenors have established that the earlier order is ineffective in abating the nuisance caused by the protest activity at 3332 Vine Street.

WHEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED BY THE COURT THAT UNTIL THE FURTHER ORDER OF THIS COURT:

Pursuant to Rule 23(A),(B) (1) and (2), and (C) of the Ohio Rules of Civil Procedure, this action is conditionally certified as a defendant class action. The class consists of:

> Persons picketing between the Soutn curb of Louis Ave and the North curb of Shields Avenue and on

both sides of Vine Street from Louis Ave to Schields Ave who have been personally served with this order as well as their officers, acents, servants, employees, attorneys and those persons in active concert or participation with them who receive personal service of the order.

The representative defendants are James Condit Jr., Jonathan Brockhoeft, Ray Loekbker and Tracy Antozak. The Court finds that the class is too numerous to join each member. The defenses of the representative defendants are common factually and/or legally and typical of the defendant class. The representative defendants have no conflicts of interest with the class and they are ably represented by counsel so the class is adequately represented.

The court finds that there is a substantial risk of individual judgments being inconsistent, and that there is a risk that a judgment outside the class context could, as a practical matter be dispositive of the interests of nonparties, and that there is uniform action by class members toward the plaintiff all making appropriate injunctive relief toward the class as a whole.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT:

Defendant class members are hereby restrained and enjoined from doing or causing to be done, instigating, encouraging, maintaining, aiding or abetting any person in doing any of the following:

1. Screaming, chanting, speaking and singing in a manner designed, intended or having the effect of reaching the patients inside the clinic at 3332 Vine Street, Cincinnati, OH, or the tenants inside the apartment building at One Louis Street, Cincinnati, OH;

2. Screaming at patients entering or leaving the medical clinic at 3332 Vine Street, Cincinnati, OH;

3. Blocking or obstructing in any manner any driveway or pedestrian entrance areas or exit areas or the public walkway on the east side of Vine Street between Shields and Louis Streets;

4. All mass picketing, except that five picketers may be present as follows:

a. One stationary picket may be present on the public sidewalk on Louis Street as long as neither he or she nor the sign the person carries crosses over into the sidewalk area of Vine Street.

b. One stationary picket may be present on the public sidewalk on Shields Street as long as neither he or she nor the sign the person carries crosses over into the sidewalk area of Vine Street.

c. Three moving pickets, one each at the locations labeled (1), (2), and (3) on the attached diagram. Location (1) extends from the corner of Louis Avenue to the north corner of plaintiff's property. Location (2) extends from the north corner of plaintiff's property to the north side of the intersection of plaintiff's driveway with the public

walk. Location (3) extends from the south edge of plaintiff's drive to the corner at Shields Street. Those who are moving, if they wish to rest, must move completely off the east side of Vine Street between Louis Street and Shields Street.

There is no order at this time with respect to the west side of Vine street except that in all cases there may be no loud talking, chanting or praying in a voice so loud that it does reach the interior of the clinic at 3332 Vine Street or the apartments at One Louis Street.

Plaintiff shall publish this order in the Cincinnati Enquirer and the Cincinnati Post. Plaintiff shall also post a copy of this order in front of the clinic at 3332 Vine Street. This notice is only an accomodation. Official class notice is by personal service on class memebers.

No further service of this order shall be necessary on the representative defendants. For the purpose of this order "persons picketing" and a "picket" include persons present in the area referred to in this order who are carrying protest and informational signs, passing out literature, speaking publicly, or otherwise engaged in activity intended to inform, influence and persuade the public about matters of public interest, including abortion. Service of this order on such people shall be effected by the Sheriff of Hamilton County on June 21, 1986, and on such other dates as the Court directs. At all other times, service of this order may be made by a representative of the plaintiff. Service documented by videotape will be preferred. Other evidence of service will be acceptable at the option of the Court. Those serving members of the class with this order shall

request the name and address of the person served. A person refusing to accept the order shall be deemed to be served.

The Sheriff of Hamilton County may enforce the terms of this order.

The bond posted by plaintiff shall be continued and shall apply to the plaintiff intervenors as well.

SO ORDERED

Date: June 20, 1986

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Judge Crush

APPENDIX G

[Filed June 27, 1986]

COURT OF COMMON PLEAS
HAMLTON COUNTY, OHIO

CASE NO. A-86-02417

(Judge Crush)

PLANNED PARENTHOOD ASSOCIATION
OF CINCINNATI, INC.

Plaintiff

vs

PROJECT JERICHO, et al

Defendants

ORDER TO THE SHERIFF

The Sheriff of Hamilton County is hereby ordered to be present at the vicinity of 3332 Vine Street on Saturday, June 28, 1986, between the hours of 8:00 A.M. and 1:00 P.M. and during those hours to enforce the injunction filed herein on June 20, 1986. Said enforcement shall be by service of the order and arrest of violators, if any, upon whom the order has at any time been served. The police

department of the City of Cincinnati is equally empowered to enforce this order, and to aid the sheriff in doing so.

The sheriff may hereafter enforce this order by service and arrest at any appropriate time on any day.

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Thomas H. Crush, Judge